93-98

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

Mary A. Robb,

Petitioner,

v.

Electronic Data Systems,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

KENNETH H. MOLBERG
WILSON, WILLIAMS,
MOLBERG & MITCHELL
2214 Main Street
Dallas, Texas 75201-4324
(214) 748-5276
(214) 748-7965 - Telecopier

Counsel for Petitioner

QUESTION PRESENTED[1]

Did the circuit court err in this age discrimination case in upholding the trial court's summary judgment determination that, as a matter of law, no genuine issue of material fact existed as to the pretextuality, *vel non*, of the reasons articulated by defendant to justify plaintiff's termination?

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[1] The caption of this case in this Court contains the names of all parties in interest.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of a panel decision of the United States Court of Appeals for the Fifth Circuit, which is unreported. It is reprinted as Appendix "C." The Memorandum Opinion of the United States District Court for The Northern District of Texas, Dallas Division (Solís, Jorge A.) is reprinted as Appendix "A." The trial court's Amended Judgment is Appendix "B."

JURISDICTION

The decision of the Court of Appeals was entered on April 16, 1993. No motion for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

As applicable to this proceeding, the relevant portions of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, *et seq.*, provide as follows:

> It shall be unlawful for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> * * *

29 U.S.C. § 623(a)(1),(2).

STATEMENT OF THE CASE

This is an employment discrimination case (R.I at 1-4). Robb sued EDS, saying that EDS violated the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et seq.*, by eliminating Robb's position and terminating her employment on account of her age (R.I at 1-4). EDS denied Robb's allegations and filed its first Motion for Summary Judgment on October 9, 1991. (R. I at 68-77). On November 4, 1991, after Robb moved for, and was given, additional time to respond to the motion, the lower court denied EDS' motion, without ruling on its merits, and dismissed it without prejudice (R.I at 128). EDS moved for summary judgment again on November 22, 1991 (R.I at 133-42). Robb responded to the motion on December 16, 1991 (R.I at 192-241). On September 4, 1992, the trial court issued its Memorandum Opinion and Order (R.I at 357-77).

The trial court assumed that Robb established a prima facie case of age discrimination and addressed only the pretext issue (R.I at 367). The court found EDS was entitled to judgment as a matter of law, because Robb did not show that EDS' articulated reasons for eliminating Robb's position and terminating her were a pretext for intentional age discrimination (R.I at 357-377). The court entered judgment for EDS on September 9, 1992 (R.I at 379). Because the judgment showed the wrong entry date, the court entered an amended judgment on September 11, 1992 (R.I at 380). Robb appealed from the amended judgment, and, in an unpublished opinion, the Fifth Circuit affirmed on April 16, 1993.

Robb was born on May 9, 1935 (R.I at 5). She was over the age of forty at all times relevant to this suit (R.I at 1, 5). She was fifty-four years old when she was terminated (R.I at 1-2, 234).

EDS hired Robb on October 22, 1984, as an administrative assistant in its Financial Services Department (R.I at 225; R.IV at 33). Robb worked in that department for about three and a half years and performed well (R.I at 226; R.IV at 34). Her evaluations were always at least "solid exceeds" (R.I at 226).

On April 27, 1988, EDS transferred Robb to its Productivity Services Department and made her an assistant industrial engineer, or "IE" (R.I at 226; R.IV at 34). The Productivity Services department provided support services to EDS' customers (R.I at 174, 181, 228). The department was divided into an insurance team, a corporate team, and a finance team (R.I at 168-69, 174, 181). Each team served a segment of EDS' business (R.I at 174, 181, 228). The department studied its customers' businesses and recommended ways to improve the productivity and save money (R.I at 169, 175, 181, 228). The teams did productivity studies of their customers' businesses followed by reports and recommendations (R.I at 181). The insurance team mainly worked with the insurance and business industries (R.I at 181, 228).

Each team had one or more managers or supervisors, several industrial engineers, and one assistant IE (R.I at 181). Rosalynn Ford became the corporate team's assistant IE in 1985, and Penny Welch became the assistant IE for the finance team in 1986 (R.I at 169, 175, 227; R.IV at 76). Robb was the assistant IE for the insurance team (R.I

at 181, 226; R.IV at 34). Darrell Herbst managed the insurance team, and Diane Kitchens was Robb's supervisor (R.I at 181, 227). Both Herbst and Kitchens were younger than Robb (R.I at 239).

Robb had many duties as the insurance team's assistant IE (R.I at 226-27). Among other things, Robb assisted the IE's on various projects (R.I at 226-27). She helped generate reports, proposals, and manuals, and assisted the IE's with their research (R.I at 226-27; R.IV at 22). Ford and Welch, the other assistant IE's, also had similar duties for their teams (R.I at 227; R.IV at 28-29). Robb trained the insurance team's new employees on their personal computers and taught them how to use various computer programs (R.I at 227).

Robb did many other things also (R.I at 226-27). Her duties did not change while she was an assistant IE (R.IV at 28). Robb worked with the corporate and finance teams (R.I at 227; R.IV at 29-30). Robb helped the other assistant IE's with projects (R.IV at 29-30). She sometimes trained new employees for the other teams (R.I at 227). Robb installed software on personal computers for the corporate, finance, and insurance teams (R.I at 226). She managed and maintained the software for the three teams, monitored their software packages, and did computer "trouble-shooting" for them (R.I at 226-27). She also installed printers, created batch files and menus on the computers, and installed mice for the teams (R.I at 226). Ford and Welch were not qualified to do these things for their teams (R.I at 227).

While there, Robb observed what she believed to be EDS' preference for younger employees (R.IV at 62, 64).

Robb was the oldest employee on her team (R.I at 236-39). EDS hired mostly young employees for the insurance team (R.I at 236-39). After her transfer to the department, EDS hired five IE's for the insurance team, all younger than Robb (R.I at 227, 236-39). In 1988, EDS hired Jack Britain, age 47; Alan Cole, age 22; and Andrea Peters, age 32 (R.I at 236-39). EDS hired Joan Erlinger, age 22, and Jeff Womack, age 23, in 1989 (R.I at 236-39).

Herbst and Kitchens told Robb in July or August 1988 that she was terminated (R.I at 230; R.IV at 37). Herbst quickly changed his mind, however, and put Robb on probation instead (R.I at 230; R.IV at 38). Robb disagreed with Herbst's probation notice and refused to sign it (R.I at 230; R.IV at 38). Herbst refused to give Robb a copy of the notice (R.I at 230; R.IV at 38). Kitchens harassed Robb (R.I at 230; R.IV at 95, 97-98, 104-05, 107, 109-10, 157-58). Robb was treated differently than the other assistant IE's (R.IV at 97-98). A week later, Kitchens told Robb she would not be assigned to any more projects (R.I at 231; R.IV at 32). Kitchens refused to send Robb to work on out-of-town projects (R.I at 231; R.IV at 32). After that, Robb worked on only two projects (R.I at 231; R.IV at 154). EDS management tried to bill at least 80% of its employees' time to an EDS customer (R.I at 182). Robb's time was not fully billed, since Kitchens refused to put Robb on any other projects (R.I at 231; R.IV at 32-33).

Later, in August 1988, Robb unsuccessfully tried to transfer out of the Productivity Services Department (R.IV at 48, 128-29, 155). Herbst gave Robb permission to transfer (R.I at 229, R.IV at 155). Herbst removed Robb from the Internal Openings and Placement list without her knowledge (R.I at 231; R.IV at 23, 155). Herbst evaluated

Robb in late October 1988 (R.I at 231, R.IV at 149). Her performance rating was "solid generally meets" (R.IV at 149). Herbst removed Robb from probation that month (R.I at 231). In about February or March 1989, Robb again unsuccessfully tried to transfer from the department (R.IV at 140-41).

On August 25, 1989, Herbst told Robb that she was terminated effective October 1, 1989 (R.I at 182, 231; R.IV at 44). Herbst told Robb that her assistant IE position was being eliminated (R.I at 231; R.IV at 44). Robb thought she would become vested in EDS' retirement plan on October 22, 1989, after five years of service (R.IV at 44-45). Herbst suggested that Robb look for employment outside of EDS, because he could not place Robb on the Internal Openings and Placement List (R.I at 231; R.IV at 44, 57). The list cannot be accessed by EDS employees (R.I at 231, R.IV at 76). A manager must access the Internal Openings and Placement List for an employee (R.I at 231; R.IV at 76). On September 5, 1989, Herbst chose two positions for Robb from the Internal Openings and Placement List (R.I at 231; R.IV at 155). He allowed her to look at the list quickly (R.I at 231-232; R.IV at 78, 155-56). Robb contacted one of the managers about a position (R.I at 232; R.IV at 80-81). Robb did not get the position, because the manager thought she was not qualified for the job (R.I at 232; R.IV at 80-81, 156).

On September 13, 1989, Robb filed a Charge of Discrimination with the Texas Commission on Human Rights and the Equal Employment Opportunity Commission ("EEOC") (R.I at 234; R.IV at 157). The EEOC amended Robb's charge on September 19, 1989 (R.I at 234-35; R.IV

at 100, 158). Robb believed that she was harassed, her position eliminated, and discriminated against because of her age (R.I at 235; R.IV at 157-58).

On September 21, 1989, Herbst called Robb at home (R.I at 232). After first asking about Robb's job search, he then instructed her not to report for work (R.I at 232; R.IV at 174-75). Robb was terminated as of September 30, 1989 (R.I at 182, 231; R.IV at 157-58). Robb was the only employee who was terminated (R.I at 231; R.IV at 56, 97-98, 101). None of the other positions were eliminated from the insurance team or the department (R.I at 231; R.IV at 56, 94, 97-98, 101). Robb was the oldest employee on the insurance team (R.I at 236-39; R.IV at 60). Ford's and Welch's assistant IE positions were not eliminated (R.I at 231; R.IV at 56, 94, 97-98, 101). Both Ford and Welch were younger than Robb (R.I at 169, 175, 227). Robb intended to work for EDS until she retired (R.IV at 45).

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

The lower court should not have granted summary judgment in favor of EDS in this age discrimination case because there was a genuine issue of fact as to whether EDS' proffered justification for eliminating Robb's position and terminating her was a pretext for intentional age discrimination. Since pretext involves a question of the credibility of the reason given by the employer to justify the adverse personnel action, it was not an issue appropriate for resolution by summary judgment.

In any event, Robb's proof in response to the motion was sufficient to require a trial of the case.

1. Legal Background

This is an age discrimination case (R.I at 1-4). Robb alleges that EDS terminated her in violation of the Age Discrimination in Employment Act of 1967 ("ADEA") (R.I at 1-4). The ADEA, simply put, makes it unlawful for an employer to discriminate against a person with respect to her compensation, terms, conditions, or privileges of employment on account of age. 29 U.S.C. § 623. It targets and protects persons age forty and older. 29 U.S.C. § 631(a).

The relative, shifting burdens in a discrimination case are important. First, the plaintiff must establish a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973). Once established, a prima facie case creates a rebuttable presumption that a defendant has engaged in intentionally discriminatory conduct. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 25 FEP Cases 113, (1981). The burden of production shifts to the defendant once the plaintiff has made out a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, *supra*, 411 U.S. at 802, 5 FEP Cases at 969.

When the burden shifts, the defendant must articulate a "legitimate, nondiscriminatory" reason for its action against the employee. *McDonnell Douglas Corp. v. Green*, *supra*, 411 U.S. at 802, 5 FEP Cases 969. In *Texas Dep't of Community Affairs v. Burdine*, the Court dealt

specifically with "the nature of the evidentiary burden placed upon a defendant in an employment discrimination suit" once a prima facie case has been made. *Texas Dep't of Community Affairs v. Burdine, supra*, 25 FEP Cases at 114. As noted by the Court, the "burden" which shifts to a defendant once the presumption of discrimination is created is one of production of evidence:

> The defendant must *clearly* set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.

Texas Dep't of Community Affairs v. Burdine, supra, 25 FEP Cases at 116 (emphasis added).

If the employer meets its burden of production[2], a plaintiff must then be given the opportunity to show that the reason asserted is pretextual, *i.e.*, not the true reason for the employment decision, or that the employer's

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[2] While a successful rebuttal of the prima facie showing will dispel the otherwise mandatory inference of discrimination, the court is bound to consider the evidence adduced in the determination of the prima facie case on the ultimate issue of discrimination. *Texas Dep't of Community Affairs v. Burdine, supra*, 450 U.S. at 22 n.10, 25 FEP Cases at 116 n. 10. *See also United States Postal Serv. v. Aikens, supra*, 460 U.S. at 718, *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 640 and n.7 (5th Cir. 1985), *disapproving* the previous view expressed in *Reeves v. General Foods Corp.*, 682 F.2d 515 (5th Cir. 1982); *Sylvester v. Callon Energy Serv.*, 724 F.2d 1210, 1213 (5th Cir. 1984).

explanation "is unworthy of credence." *Texas Dep't of Community Affairs v. Burdine*, 25 FEP Cases at 116.

Once an employer meets this burden of production, the focus proceeds to a higher level of specificity, requiring an analysis of the *credibility* of the reason asserted to justify the adverse personnel action. In other words, the burden returns to the plaintiff to show that the reason is probably not the true reason.

> The plaintiff can do this in two ways, "either [1] directly by persuading the court that a discriminatory reason more likely motivated the employer [2] indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256 . . .; *see also Bohrer v. Hanes Corp.*, 715 F.2d 213, 218 (5th Cir. 1983), cert. denied, _____ U.S. _____, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984) . . . By disproving the reasons offered by the employer to rebut the plaintiff's prima facie case, the plaintiff recreates the situation that obtained when the prima facie case was initially established: in the absence of any known reasons for the employer's decision, *we presume* that the employer was motivated by discriminatory reasons.

Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 639-40 (5th Cir. 1985)(footnote omitted; emphasis added). *Accord, Ratliff v. Governor's Highway Safety Program*, 791 F.2d 394-40 FEP Cases 1729, 1733 (5th Cir. 1986). *See also Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731, 41 FEP Cases 1097, 1099

(5th Cir. 1986); *Sylvester v. Callon Energy Serv., Inc.*, 724 F.2d 1210, 34 FEP Cases 89 (5th Cir. 1984).

If the fact finder disbelieves the reasons asserted by a defendant to justify its action against a plaintiff, then the fact finder becomes entitled to infer that the action was rooted in unlawful discrimination. *See St. Mary's Honor Center v. Hicks,* _____ U.S. _____, 61 U.S.L.W. 4782 (U.S., June 25, 1993).

Because the lower courts *decided* the dispositive issue of "pretext" by summary judgment, it is likewise appropriate to consider the controlling provisions of Fed. R. Civ. P. 56(c), which permits entry of judgment for the movant only when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Rule 56 is designed to provide a procedural avenue for the quick disposition of *meritless* claims and defenses. *See generally* Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984). Its use is proper, if at all, only where a moving party has satisfied the court that there exists "no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). Doubts as to the existence of genuine issues should be resolved against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *Page v. Delaune*, 837 F.2d 233, 2 IER Cases 1873, 1877 (5th Cir. 1988). Summary disposition should not be allowed unless it is clear that a trial on the issue is unnecessary. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). If the moving party appears to meet its burden to establish the absence of evidence to support the nonmovant's claim, only

then must the nonmovant come forth and make a showing which indicates the existence of a fact issue. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact.

477 U.S. at 323.

2. Standard of Review

In reviewing the decisions below, the Court is to apply the same legal standard as that which governs the trial court's action, *i.e.*, whether a genuine issue of material fact exists. *See Weyant v. Acceptance Ins. Co.*, 917 F.2d 209, 212 (5th Cir. 1990). "The test is identical to that used for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law'." *Chiari v. City of League City*, 920 F.2d 311, 314-15 (5th Cir. 1991, *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). In reviewing the lower court's decision, however, it is incumbent on this Court to assess the evidence in the light most favorable to Robb, the non-movant. *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 192 (5th Cir. 1988). If a question of law becomes controlling, the trial court's decision is subject to full

review. *Brooks, Tarlton, Gilbert, Douglas & Kessler v. U.S. Fire Ins. Co.*, 832 F.2d 1358, (5th Cir. 1987).

3. *A Genuine Issue of Material Fact Exists Relating to the Pretextuality of the Reason Asserted by Defendant to Justify Robb's Discharge. Thus, Summary Judgment Was Inappropriate.*

In this case, the trial court granted summary judgment because the court found that Robb did not establish that EDS' articulated reasons for terminating Robb were a pretext for intentional age discrimination (Appendix A, R.I at 357-377). It is clear that the lower court demanded, and the Fifth Circuit agreed, that Robb *prove* that the reasons asserted by defendant to justify her firing were pretextual, not merely that a genuine issue of fact existed with respect thereto. *Id.* at 367. Whether EDS has proffered a credible or otherwise legally unassailable reason for eliminating Robb's position and terminating her is not generally a question appropriate for summary judgment in the first instance. Clearly, however, a plaintiff is not required to *prove by a preponderance of the evidence* in summary judgment proceedings that the defendant's reasons are pretextual or that they lack credibility. Yet, this is precisely what the trial court required (Appendix A, R.I at 367). To the contrary, Fed. R. Civ. P. 56 requires only that Robb establish that a genuine fact issue exists with respect to the issue of pretext.

Where the basis for the granting of summary judgment is that defendant has proffered a legitimate reason for an adverse personnel action that allegedly negates a finding of discrimination, the employer's motive is immediately in question, and the issue of credibility of that reason is

raised. "Therefore, because 'the issue of pretext turns on ... credibility [,it] is not appropriate for resolution on a summary judgment motion'." *Jackson v. University of Pittsburgh*, 826 F.2d 230, 44 FEP Cases 977, 981 (3rd Cir. 1987), *quoting Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 901, 43 FEP Cases 681 (3rd Cir. 1987). *Accord Haglof v. Northwest Rehabilitation*, 910 F.2d 497, 54 FEP Cases 1211 (8th Cir. 1990). *See also* S. Fitzwater, *et al.*, *Recent Summary Judgment Jurisprudence for the Fifth Circuit Practitioner*, 5 Fifth Circuit Reporter 769, 770-71 (West, 1988). While the Fifth Circuit may not agree with other circuits' expressions (as the circuit indicated in its opinion here), there is a simple good reason why the issue of pretext should not be resolved in summary judgment proceedings when the non-movant has proffered a substantive, head-on response, namely: an analysis of the pretext issue involves determinations of credibility.

At most, to defeat a summary judgment bottomed on a defendant's proffer of an alleged nondiscriminatory reason for an adverse personnel action, a plaintiff "need only to point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence." *Sorba v. Pennsylvania Drilling Co., Inc.*, 821 F.2d 200, 44 FEP Cases 54, 58 (3rd Cir. 1987). Robb met this challenge. *See* Statement of the Case, *supra*, at 4-7. The district court clearly required more. *See* Appendix A, R.I at 367.

Apart from this, there was sufficient evidence at the summary judgment stage to call the defendant's articulated reason into question and require that the matter proceed to trial. For example, Robb was not given a full opportunity to use the internal transfer system of the company (R.I at

231), despite her entitlement to do so. EDS' reason for not giving Robb that opportunity was that it had a policy which prohibited the use of the internal transfer system twice in a six-month period (R.I. at 106). Robb last used the internal transfer system on February 6, 1989 (R.I at 71). Had EDS followed its policy, Robb should have been allowed to use the system after August 6, 1989. EDS did not give a nondiscriminatory reason for its failure to follow its own policy.

Moreover, the credibility of the reasons articulated to justify Robb's firing are called into question by various other items of evidence before the district court. Among these are: Plaintiff's observation of defendant's treatment of younger employees; the fact that Robb's was the only job eliminated and that two younger individuals in comparable positions were not discharged; and her history of good performance.

EDS' failure to follow its own policy of placing Robb on the internal transfer system after the six-month period resulted in Robb not finding another position within EDS and, eventually, her termination (R.I at 106). This is significant evidence of pretext.

Thus, the court erred in finding that EDS' articulated reason for Robb's treatment was, as a matter of law, not pretextual. Pretextuality is a central issue in a case of this nature. The district court erred in holding against the plaintiff, both in application of law and in the factual assessment.

CONCLUSION

Because the lower courts clearly have erred in granting summary judgment against the plaintiff, this Court should grant the writ and set this case for briefing and argument.

Respectfully submitted,

WILSON, WILLIAMS,
MOLBERG & MITCHELL
2214 Main Street
Dallas, Texas 75201-4324
214/748-5276
214/748-7965 - Telecopier

By: Kenneth H. Molberg

ATTORNEYS FOR PETITIONER

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

MARY A. ROBB,

Plaintiff,

v. CIVIL ACTION NO. 3-90-1575-P

ELECTRONIC DATA SYSTEMS,

Defendant.

(Filed September 4, 1992)

(Entered on Docket September 10, 1992)

MEMORANDUM OPINION AND ORDER

Now before the Court is the Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 5.2(a), of the defendant, ELECTRONIC DATA SYSTEMS ("EDS").

I. INTRODUCTION

EDS moves for summary judgment on the plaintiff's, Mary A. Robb ("Robb"), claim of discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq. ("ADEA").

The pleadings on file, the deposition excerpts and the supporting affidavits filed with this Court show that there is no genuine issue as to any material fact and that EDS is entitled to judgment as a matter of law.

II. FACTS

Examining the record in the light most favorable to plaintiff, the facts are as follows.

Robb was born May 9, 1935. At all times relevant to this lawsuit, Robb was over the age of 40.

Robb was hired by EDS on October 22, 1984 at the age of 49. She worked for EDS until her position was eliminated on September 30, 1989. At that time, she was 54 years of age.

Robb began her employment with EDS as an Administrative Assistant in the Financial Services Department of EDS. Her manager in that job was Joe Dorfmeister, born on January 22, 1943.

On or about April 1, 1988, Robb sought a transfer to a more technical position which entailed traveling. At that

time, she was unwilling to relocate and was unwilling to work the third shift.

On or about April 27, 1988, Robb received a transfer to the Productivity Services Department of EDS.

The basic function of the Productivity Services Department is to support EDS customers by studying their productivity and making recommendations for improving productivity and achieving cost savings.

The Productivity Services Department is divided into three sub-divisions or teams, each of which supports a different business segment of EDS customers. The teams are insurance, finance and corporate.

Each team consisted generally of one or more managers or supervisors, several Industrial Engineers ("IE") and one Assistant IE. All team employees stepped in for each other.

Robb held the position of Assistant IE for the insurance group. Her manager in that job, and for the remainder of her employment at EDS, was Darell Herbst, born on May 16, 1941.

Robb's duties as the Assistant IE for the insurance group were, first and foremost, to assist the I.E.s in fulfilling their responsibilities. She was to "support IE Projects" by assisting in the generation of reports and proposals and assisting in research, among other tasks.

The creation of reports was the primary task of Robb's position. Robb also managed personal computers and software and helped train new personnel on the personal computers. Robb also assisted the other assistant I.E.'s training the new personnel when the other assistant I.E.'s were busy.

On or about August 15, 1988, after only a few months as the Assistant IE for the insurance group, Robb sought another transfer to a more technical position entailing over 75% travel. Again, Robb was unwilling to relocate to pursue such a position and was unwilling to work the third shift.

Robb did not obtain the transfer she had sought in August 1988, and on or about February 6, 1989, she sought another transfer, again to a more technical position entailing travel. Unlike her previous transfer requests, on this occasion Robb indicated a willingness to relocate, albeit only to the West.

In 1989, the insurance group of the Productivity Services Department experienced a shift in the nature of its work. Instead of generating numerous large reports and proposals for recommended action by the customers, the insurance team assumed the responsibility for actually implementing the suggested improvements. This created more work that the IEs were required to handle personally, and eliminated work that they could delegate to the Assistant IE.

Robb's immediate supervisor, Ms. Kitchens, had personal ill feelings towards Robb. Mr. Herbst had informed Robb that Ms. Kitchen could not work with her. Because of the change in their work, and the personality conflict between Robb and Kitchens, the IEs on the insurance team began to rely less and less on Robb, their Assistant IE. They found that they could complete their work more efficiently and effectively without depending upon her for assistance.

Because the Assistant IE position on the insurance team was underutilized, Robb's time could not be billed to EDS customers at the level management expected. Management sought to bill at least 80% of each employee's work time, but less than 25% of Robb's time could be billed.

These changes did not affect the other two teams in the Productivity Services Department. They continued to perform as before, with the IEs in those groups placing substantial reliance on their Assistant IEs. Those teams did not, however, have a need for more than one Assistant IE each.

The Assistant IE for the finance group was Penny Welch, born on July 22, 1958, and the Assistant IE for the corporate group was Rosalynn Ford, born on September 20, 1946.

Both of these individuals had greater experience as Assistant IEs than Robb. Welch became an Assistant IE in

1986 and Ford became an Assistant IE in 1985, while Robb did not become an Assistant IE until 1988. Robb had more experience and knowledge in computers than the other assistant I.E.s.

Both Welch and Ford had greater overall seniority at EDS than Robb. They were each hired by EDS in 1980, while Robb was not employed by EDS until 1984. Robb has alleged that Welch was often out of the office and difficult to find when needed for a project. Robb has also alleged that Welch "threw tantrums" when she had to do something she did not like or want to do.

Both Welch and Ford had higher performance ratings than Robb at the time Robb's employment terminated. They were each rated "Solid Exceeds" expectations at that time, while Robb was rated "Solid Generally Meets" expectations, **two levels below the others' ratings.**

Neither Welch nor Ford was managed by Darell Herbst, and he did not have the authority to affect their employment status in any way. Mr. Herbst's authority was not exclusive to the insurance team.

After concluding that he could no longer justify maintaining the Assistant IE position for the insurance group, Darell Herbst notified Robb on August 25, 1989 that her position would be eliminated effective September 30, 1989.

Employees are not allowed to access the Internal Openings and Placement list. The employees manager has to initiate the process in Internal Openings and Placements. Because of her previous transfer requests, Robb was ineligible in August 1989 to enter formally into EDS' Internal Transfer ("IT") program. However, on or about August 28, 1989, Mr. Herbst accessed the position openings in the IT program and allowed Robb to peruse the listed openings and to pursue any position for which she believed she was qualified.

Together, Robb and Herbst identified two internal job openings for which she appeared to be at least minimally qualified. She phoned the manager of one of the available positions. He informed her she did not qualify for the job.

During her five-week notice period, Robb was allowed to be absent from work with pay whenever necessary to pursue either internal or external job opportunities. During the last ten days or so of the five-week notice period, Mr. Herbst called Robb at home. He asked Robb how the search was going and said that since it was getting down to the last week of the thirty day notice she did not have to bother coming into the office.

At the time her employment terminated, Robb had a vested benefit in the EDS Retirement Plan, which she will be entitled to receive when she reaches normal retirement age.

Prior to the time her employment terminated, on September 13, 1989, Robb filed a "Charge of [Age] Discrimination" with the Equal Employment Opportunity Commission ("EEOC"). She filed an Amended Charge on September 19, 1989. The Amended Charge was still being investigated when Robb filed the present lawsuit on July 5, 1990, resulting in the termination of the EEOC's investigation.

STANDARDS FOR SUMMARY JUDGMENT

Pursuant to Rule 56(c) Fed. R. Civ. Proc., summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Anderson v. Liberty Lobby, 477 U.S. 242, S. Ct. 2505, 91 L. Ed.2d 202 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986). The burden of showing entitlement to summary judgment falls squarely and with great weight upon the moving party. Pitts v. Shell Oil Company, 463 F.2d 331 (5th Cir. 1972). For summary judgment to enter, the pleadings, depositions, admissions, and affidavits, must be considered in the light most favorable to the nonmoving party. Galindo v. Precision American Corp., 754 F.2d 1212 (5th Cir.), reh'g denied, 762 F.2d 1004 (1985).

Once a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106

S. Ct. 2505, 91 L. Ed.2d 202 (1986). The substantive law will identify what facts are material. Id. at 248. A dispute as to a material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. at 248.

Federal courts interpreting Rule 56 have uniformly recognized that evidence of a plaintiff's belief, or testimony based on conjecture, with no specific facts to support the belief or conjecture is insufficient to raise a genuine issue of material fact. E.g., Slaughter v. Allstate Ins. Co., 803 F.2d 857, 860 (5th Cir. 1986). Conclusory allegations fare no better. Laurence v. Chevron, U.S.A., Inc., 885 F.2d 280, 285 (5th Cir. 1989).

As demonstrated below, Robb cannot sustain her burden of presenting sufficient evidence to warrant a trial in this case. Specifically, she cannot present any evidence which could cause a reasonable trier of fact to conclude that she was discriminated against based upon her age.

AGE DISCRIMINATION STANDARDS

An analysis of the burdens of proof and persuasion under the ADEA demonstrates why summary judgment is appropriate in this case. The United States Supreme Court has articulated the order and allocation of proof applicable to discrimination cases. The Court first announced the standard for establishing a prima facie discrimination case in a hiring context under Title VII of the Civil Rights Act

of 1964. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Although the standard for a prima facie case was established in a hiring case under Title VII, the courts apply this test, or appropriate modifications of the test, to litigation involving other types of employment actions, including discrimination based on age. E.g., Laurence, supra, 885 F.2d at 285 (alleged age-based failure to promote). For example, a prima facie case of discriminatory discharge under the ADEA requires the plaintiff to show that:

1. She was over 40 years of age;

2. She was discharged;

3. She was qualified for the position she held; and

4. After her discharge, the employer filled the position with someone sufficiently younger to permit an inference of age discrimination. E.g., Burns v. Texas City Refining, Inc., 890 F.2d 747, 750 (5th Cir. 1989), reh'g and reh'g en banc denied, 896 F.2d 549 (5th Cir. 1990); Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1506 (5th Cir. 1988).

In a situation where the plaintiff's position is not filled, such as the present case, the third and fourth elements are modified to make them appropriate under the circumstances. The modified elements are that:

3. The plaintiff was qualified to assume another position with the employer; and

4. There is evidence from which a fact finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue. E.g., Sherrod v. Sears, Roebuck & Co., 785 F.2d 1312, 1314 (5th Cir. 1986).

Assuming the plaintiff can establish a prima facie case, and thereby meet her initial burden of production, the employer must then articulate a non-discriminatory reason for its actions. After the defendant has met this burden of production, the plaintiff must demonstrate that the employer's stated reason for its actions was a pretext for illegal age discrimination. E.g., Little v. Republic Refining Co., 924 F.2d 93, 96 (5th Cir. 1991).

While the burden of production shifts from the plaintiff to the defendant and back to the plaintiff, the burden of persuading the fact finder that intentional discrimination exists always remains with the plaintiff. E.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 245 (1989); U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 714, 716 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 256 (1981). Moreover, "a plaintiff whose employment position is eliminated in a corporate reorganization or work force reduction carries a heavier burden in supporting charges of discrimination than does an employee discharged for other reasons." Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510, 517 (6th

Cir. 1991). Accord, Aungst v. Westinghouse Electric Corp., 937 F.2d 1216, 1220-21 (7th Cir. 1991).

Under Rule 56, and pursuant to the dictates of Celotex, supra, summary judgment on the merits is appropriate in age discrimination cases. Slaughter, supra, 803 F.2d at 860-61. Summary judgment may be granted in discrimination cases when the defendant demonstrates that the plaintiff cannot establish a prima facie case of intentional discrimination. E.g., Huhn v. Koehring Co., 718 F.2d 239, 245 (7th Cir. 1983), reh'g and reh'g en banc denied (7th Cir. 1984) (summary judgment for employer affirmed where plaintiff could not "demonstrate that he was qualified to continue in his sales position in the sense that his performance did, in fact, meet [the employer's] legitimate expectations.")

It is important to note that "establishment of a prima facie case of employment discrimination does not automatically entitle the plaintiff to a jury determination of the discrimination claim." Bienkowski, supra, 851 F.2d at 1505, n. 1.

Summary judgment also is appropriate when the plaintiff cannot sustain her burden of proving that the defendant's articulated non-discriminatory reason for the adverse employment action was a pretext for intentional discrimination. Slaughter, supra, 803 F.2d at 860-61.

ISSUE OF LAW

1. Whether Robb can produce sufficient evidence to establish that EDS' articulated reasons for eliminating her position were a pretext for intentional age discrimination.

For purposes of addressing the issue of pretext, the Court assumes that Robb has established a prima facie case. Based upon this assumption, the burden of production shifts to EDS to articulate a non-discriminatory reason for its actions. While an employer need not persuade a court that the proffered reason actually motivated its decision, the defendant's evidence must raise "a genuine issue of fact as to whether it discriminated against the plaintiff." Laurence, supra, 885 F.2d at 283 (citations omitted). While the burden of production shifts, the burden of persuasion always remains with the plaintiff. E.g., Burdine, supra, 450 U.S. at 256.

As described in his Affidavit, Darell Herbst decided to eliminate Robb's position when the nature of the work in his department changed and her services could not be utilized fully. Robb acknowledges that this was the only reason proffered by Mr. Herbst for the termination of her employment. A more detailed explanation of EDS' reasons for eliminating Robb's position, and her inability to find another position within EDS, may be found in the above statement of facts. Since EDS has articulated these non-discriminatory reasons for Robb's discharge, Robb must now have the opportunity to demonstrate that the proffered reason was not the true reason for the

employment decision. The plaintiff retains the burden of persuasion. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglas, 411 U.S., at 804-805.

ROBB'S ATTEMPTS TO SHOW PRETEXT

Robb does not claim that any age-related remarks ever were made by EDS personnel. There is no evidence of any age-based comments made at any time by anyone. In the absence of such evidence, Robb relies upon little but her own supposition that age discrimination occurred. As demonstrated below, what little evidence Robb can muster is legally insufficient to reach the jury on the issue of pretext.

1. Robb's Subjective Belief of Pretext.

Robb relies on her own belief that age was adetermining factor in the decision to eliminate her position. Yet, it is well settled that the plaintiff's subjective belief that she was discriminated against will notsuffice to create a genuine issue as to pretext. Little, supra, 924 F.2d at 96; Elliott v. Group Medical & Surgical Services, 714 F.2d 556, 567 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984).

Robb's subjective belief is insufficient to show pretext.

2. Robb' s Attempt to Infer Pretext From the Ages Of Employees Who Were Not Terminated.

Robb relies on the fact that the individuals with whom she worked, including the manager who eliminated her position, were younger than her or under the age of 40. Again, such evidence is legally insufficient to demonstrate pretext. Little, supra, 924 F.2d at 96.

Even if it were probative, Robb's inference of age discrimination merely from the ages of others is implausible under the circumstances of this case. She was hired by EDS at the age of 49 by a manager, Joe Dorfmeister, who was also over the age of 40 at the time. Robb later transferred at the age of 52 to another manager, Darell Herbst, who was one month shy of 47 at that time. At the age of 53, Robb was put on a performance improvement plan, but not discharged, by this same manager, who was then 47. Her position was ultimately eliminated when she was 54 and her manager was 48.

There is no plausible evidence that Herbst, an age contemporary of Robb, was motivated by unlawful age animus when he terminated Robb.

The ages of Robb's manager or co-workers are insufficient to show pretext.

3. Robb's attempt to Show Age Bias by the Fact That The Only Position Eliminated Was Then Held by the Oldest Person in the Department.

Robb also relies on the fact that she was the oldest person in her department and was the only person whose position was eliminated. The plaintiff in Sherrod, supra, relied upon exactly the same evidence, which was found to be insufficient to uphold the jury's verdict of age discrimination. 785 F.2d at 1315- 16. As the Fifth Circuit recently observed, the mere fact that an older worker is adversely impacted by the realignment of employees in a corporate reorganization does not demonstrate age bias. Little, supra, 924 F.2d at 98.

To establish intentional discrimination, Robb must show that EDS gave preferential treatment to a younger employee under nearly identical circumstances. Id. at 97. She cannot show this with respect to the employees who assumed what remained of her duties, however, because they were not similarly situated. Robb was an Assistant Industrial Engineer ("IE") and her duties were absorbed by the IEs she was employed to assist. The need for an assistant, and not the underlying IE work, diminished. Robb held the only Assistant IE position in her department, which explains why she was the only person to lose her job when the Assistant IE work evaporated. Thus, it is inappropriate to compare Robb to the IEs she formerly assisted.

Likewise, Robb was not similarly situated to the two Assistant IEs in the other departments. It is uncontroverted that their job responsibilities did not diminish because of changes in customer requirements, as Robb's did. In addition, **both had performance ratings two levels higher than Robb's rating, both had four years more EDS seniority than Robb had and both had at least two years more experience as Assistant IEs than Robb had.** Thus, it also is inappropriate to compare Robb to the Assistant IEs in her sister departments. There simply is not anyone younger, or older for that matter, to whom Robb can point who received preferential treatment under identical, or even similar, circumstances to hers. Although it is unfortunate for Robb, she was the lone occupant of a position which was no longer needed. But the elimination of that position does not become age discrimination just because its holder happened to be over 40, and other employees under 40 remained employed in different positions and different departments.

The fact that the only position eliminated was then held by the oldest person in the department is insufficient to demonstrate age bias.

4. Robb's Attempt to Show Pretext by Her Proximity To Retirement at Termination.

Robb also relies on her belief that EDS sought to prevent her from vesting in the EDS Retirement Plan by terminating her employment 22 days before she vested. This theory has no factual basis because, as Robb

ultimately acknowledged, she was, in reality, already vested at the time her employment terminated. She will, in fact, be receiving her benefits at normal retirement age.

Nevertheless, Robb continues to cling to the theory that EDS realized a savings in its Retirement Plan by terminating her employment. Although it is self-evident that retirement costs, or any other benefit for that matter, may be reduced by reducing the number of employees eligible for the benefit, the same savings could be realized by discharging younger employees, or even older employees who are not vested. Robb does not even purport to explain how any alleged savings is achieved by discharging older vested workers, such as herself.

To illustrate the fallacy of Robb's theory, it is necessary to look no further than the other two Assistant IEs. They both had more years of EDS service than Robb, and they also had more years of potential service remaining before normal retirement age. Because their retirement benefits will be correspondingly higher at age 65, EDS could have saved more by terminating their employment than by terminating Robb's employment. Robb herself was over 11 years away from retirement at the time her employment terminated. Nothing but Robb's own conjecture suggests that EDS had a plan to reap savings 11 years hence by eliminating her position in the present. Moreover, even Robb admits that she does not know what, if any, savings would have been realized by this purported 11-year plan.

Even if Robb could establish some factual connection between her proximity to normal retirement age, and the decision to eliminate her position, such evidence is legally insufficient to establish that EDS' reasons for eliminating her position were pretextual. As stated in Williams v. General Motors Corp., 656 F.2d 120 (Sth Cir. 1981):

> [S]eniority and age discrimination are unrelated. The ADEA targets discrimination against employees who fall within a protected age category, not employees who have attained a given seniority status. . . . We state without equivocation that the seniority a given plaintiff has accumulated entitles [her] to no better or worse treatment in an age discrimination suit. Id. at 130, n. 17.

5. Robb's Attempt to Show Pretext As a Result of Her Disagreement with Management Over the Quality of Her Performance or the Decision to Eliminate Her Position.

Robb apparently takes issue with EDS' evaluation of her performance and attitude. She even claims that her manager did not have sufficient knowledge of their department's work to rate her performance. However, "[s]tatements made by inferior employees are not probative of an intent to discriminate by the decisions." Aungst, supra, 937 F.2d at 1221.

Moreover, "[t]he existence of competing evidence about the objective correctness of a fact underlying [EDS']

proffered explanation does not in itself make reasonable an inference that [EDS] was not truly motivated by its proffered justification....[E]ven an incorrect belief that an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason." Little, supra, 924 F.2d at 97. "The ADEA cannot protect older employees from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated." Laurence, supra, 885 F.2d at 285.

In a reduction in force context, it is inevitable that good, or even excellent, performers may lose their jobs. Thus, even if Robb was correct that her performance rating was lower than it should have been, that would not have saved her job. The duties of her position, not those of the other Assistant IEs, evaporated. Indeed, even Robb acknowledges that she did not have complete knowledge of the responsibilities of those other positions. Based upon those undisputed facts, Robb's manager decided to eliminate her position in the exercise of good faith business judgment. The ADEA does not entitle the federal courts to second-guess that decision. Bienkowski, supra, 851 F.2d at 1507-08. Accord, Elliott, supra, 714 F.2d at 567 (employer entitled to make subjective judgment that one employee will do better job than another).

6. Robb's Attempt to Show That She Was Harassed Because of Her Age.

Robb relies upon the allegation that she was "harassed" by her manager or co-workers. The instances of "harassment" included the following:

a. A co-worker would "mess up PCs," refuse to communicate and restrict the flow of information in the workplace,

b. This same co-worker used "little yellow stick-ums" to advise Robb of revisions to their work product,

c. Robb's ideas for creating standard forms to use in her work were not accepted by her management,

d. Robb was asked to demonstrate why one of her work projects could not be completed as required; and

e. Robb was placed on a performance improvement plan by her manager.

Robb cannot connect a single one of these incidents of "harassment" to her age. She testified as follows:

Q.Was he doing that [items "a" and "b" above] because of age?

A.How should I know why he was doing it.

Q.Did you believe that he was doing it because of age?

A.Did I believe? Goodness. I don't know.

* * *

Q.No. Was what Bob Tennant did, at least in your view, based on age?

A.I don't know.

* * *

Q.Okay. As we sit here right now this minute, do you think so?

A.I have no idea.

* * *

Q.Do you believe it [item "c" above] was because of your age?

A.I don't know.

* * *

Q.Do you think it [item "d" above] was because of your age?

A.I have no idea.

* * *

Q.Okay. Is it your belief that you were put on this Performance Improvement Plan in August of 1988 [item "e" above] because of age discrimination?

A.I don't know.

* * *

Q. You don't know. Is it your belief that you were called into the office and originally told you were going to be let go because of age discrimination?

A. I don't know.

* * *

Q. Was the motive for telling you that at that time [item "e" above], as far as you knew because of your age?

A. It wasn't my motive, so I had no idea.

Q. At that time, did you believe it was because of your age?

A. I had no idea what motive it was.

Q. Did you believe it was because of your age?

A. I have no idea what the motive was

7. Robb's allusion to statistical evidence of age bias to show to demonstrate pretext.

Robb apparently believes that statistical analysis would demonstrate a tendency on EDS' part to discharge older workers or to recruit younger ones. However, no such analysis has been undertaken or presented. Robb's mere conjecture that EDS prefers younger employees is insufficient to raise a genuine issue of material fact. Slaughter, supra, 803 F.2d at 860.

Even if a statistical analysis had been done, it would not be sufficient to demonstrate intentional discrimination

against Robb. Williams, supra, 656 F.2d at 130, n. 17 ("bare fact that an employer encourages employment of recent college . . . graduates does not constitute unlawful age discrimination"); Sessions v. Rusk State Hosp., 648 F.2d 1066, 1071 (5th Cir. 1981)("statistical evidence buttresses [plaintiff's] prima facie case, but it does not demonstrate [pretext]").

In short, Robb is asking this Court to find age discrimination simply because she cannot accept the fact, or does not recall, that EDS had other legitimate reasons to eliminate her position. Robb is asking this Court to serve as a super-personnel department to review that decision. However, the ADEA neither requires nor sanctions that result.

CONCLUSION

Robb has not shown that EDS' articulated reasons for eliminating her position were a pretext for intentional age discrimination.

Based on the foregoing, EDS is entitled to judgment as a matter of law on Robb's claim of age discrimination, as there are no genuine issues of material fact that would preclude summary judgment.

IT IS SO ORDERED.

Signed September 4, 1992

/s/
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARY A. ROBB	§	
	§	
Plaintiff	§	
	§	CIVIL ACTION NO.
v.	§	3:90-CV-1575-P
	§	
ELECTRONIC DATA SYSTEMS,	§	
	§	
	§	
Defendant	§	

Filed September 10, 1992

AMENDED JUDGMENT

This Judgment is issued pursuant to the Court's Memorandum Opinion and Order dated September 4, 1992.

IT IS ORDERED, ADJUDGED and DECREED by the Court that Plaintiff Mary A. Robb take nothing by her suit against Defendant Electronic Data Systems, and that this suit, be, and it is hereby, DISMISSED on the merits at Plaintiff's cost.

A judgment was entered by the Court on September 9, 1992, but it mistakenly reflected that it was entered May 9, 1992. The Amended Judgment is entered to reflect the correct date.

SIGNED this ____ day of September, 1992.

/s/
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1875
(Summary Calendar)

MARY A. ROBB

Plaintiff-Appellant,

versus

ELECTRONIC DATA SYSTEMS CORPORATION,

Defendant-Appellee.

Filed April 16, 1993

Appeal from the United States District Court
for the Northern District of Texas
(3:90-CV-1575-P)

BEFORE KING, DAVIS, and WEINER, Circuit Judges.

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense to the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

In this age discrimination suit, Plaintiff-Appellant Mary A. Robb appeals the district court's grant of summary judgment dismissing her claim against her former employer, Defendant-Appellee Electronic Data Systems Corporation (E.D.S.) As the district court, in an apparent effort to enlighten counsel for Robb, painstakenly crafted a lengthy and explicit opinion correctly setting forth the controlling case law which renders Robb's evidence insufficient as a matter of law, we adopt that court's writing and the reasoning within. We add only a few comments to address the arguments asserted by Robb on appeal.

For the first time on appeal, Robb argues that there is a genuine issue of material fact whether EDS' reason for not transferring Robb to another position within the company is pretext. We decline to consider issues that have not been presented to the district court unless the issue is a purely legal one and failure to consider it would work and injustice.[1] Robb has failed to demonstrate that our failure to consider this issue would be unjust and we are convinced that no injustice will result. Consequently, we decline to consider this issue that has not been presented to the district court and has not been ruled on by it.

We write also to emphasize that Robb's brief, although correctly formulating the issue on appeal, fails actually to argue that issue. Instead, it argues that "[w]hether EDS has proffered a credible reason for eliminating Robb's

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[1]Volkswagen of America, Inc. v. Robertson, 713 F.2d 1151, 166 (5th Cir. 1983).

position and terminating her is not a question for summary judgment." This is simply wrong. In making this argument, Robb's counsel ignores the well-established case law of this Circuit, which the district court cites in its opinion. Counsel does not attempt to distinguish this case law, but instead chooses to ignore it, relying on Third Circuit case law as support. We remind counsel that, as an officer of the court, failing to cite controlling law--especially when one is on notice that controlling precedent exists--is a breach of duty to this court--a breach that can be sanctionable. We assume no more need be said on this issue.

For the reasons set forth in the district court's opinion, the grant of summary judgment is
AFFIRMED.